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6 Attorneys for Plaintiffs

7 LENSCRAFTERS, INC., EYEXAM OF  
8 CALIFORNIA, INC., and EYEMED VISION CARE, LLC

9 IN THE UNITED STATES DISTRICT COURT

10 NORTHERN DISTRICT OF CALIFORNIA

11 LENSCRAFTERS, INC.; EYEXAM OF  
12 CALIFORNIA, INC.; and EYEMED VISION  
13 CARE, LLC,

Case No.: CV-04-01001 SBA

14 Plaintiffs,  
15 v.  
16 LIBERTY MUTUAL FIRE INSURANCE  
17 COMPANY and EXECUTIVE RISK SPECIALTY  
18 INSURANCE COMPANY,  
19 Defendants,

**PLAINTIFFS' NOTICE OF  
ADMINISTRATIVE MOTION AND  
ADMINISTRATIVE MOTION TO  
CONSIDER WHETHER CASES  
SHOULD BE RELATED**

[LOCAL RULE 3-12(b)]

20 AND RELATED COUNTER- AND CROSS-  
21 CLAIMS.

1 TO ALL PARTIES IN THIS ACTION AND IN CASE NO. C-07-2853 EMC AND THEIR  
 2 ATTORNEYS OF RECORD:

3 PLEASE TAKE NOTICE THAT Plaintiffs LensCrafters, Inc., EYEXAM of California, Inc.  
 4 and EYEMED Vision Care, LLC hereby move pursuant to Local Rule 3-12(b) to request the  
 5 Court's consideration that Case No. C-07-2853 EMC, filed by LensCrafters, Inc. and EYEXAM of  
 6 California, Inc. on May 31, 2007, be deemed a "related case," within the meaning of Local Rule 3-  
 7 12(a), to the above action and that the case be re-assigned to the Honorable Saundra Brown  
 8 Armstrong. The basis for this motion is that both actions concern substantially the same parties and  
 9 issues, and it appears likely that there will be an unduly burdensome duplication of labor and  
 10 expense, and conflicting results, if the cases are conducted before different judges. This motion is  
 11 based on the accompanying Memorandum, the Declaration of Celia M. Jackson filed herewith, and  
 12 exhibits thereto, and the pleadings filed in both actions.

13 **MEMORANDUM IN SUPPORT OF MOTION**

14 **I. INTRODUCTION**

15 Plaintiffs hereby ask the Court to find that a case filed by LensCrafters, Inc. and EYEXAM  
 16 of California, Inc. on May 31, 2007, Case No. C 07 2852 EMC, is related to the above action and  
 17 that it be assigned to the Honorable Saundra Brown Armstrong. Both cases involve substantially  
 18 the same parties and issues, namely insurance coverage for a putative class action entitled *Melvin*  
 19 *Gene Snow, et al. v. LensCrafters, Inc., et al.*, San Francisco Superior Court Case No. CGC-02-  
 20 40554 (the "Snow Action"). The first action involved the duty to defend the *Snow Action*; the later-  
 21 filed action concerns the duty to indemnify the *Snow Action*. Claims related to the duty to  
 22 indemnify were initially pled in the first action, but were dismissed as not being ripe. Now these  
 23 claims are ripe. Given the time that the Court has already devoted to substantive motions in the  
 24 first action, it will serve the interests of judicial economy, and avoid the risk of conflicting results,  
 25 to have the later-filed case heard by Judge Armstrong. Four of the five defendants in the newly  
 26 filed action, including both defendants in the original action, do not object to having the Court  
 27 deem the second action related to the originally filed lawsuit.

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1       **II. THE FIRST ACTION**

2       In March 2004, plaintiffs LensCrafters, Inc., EYEXAM of California, Inc. and EyeMed  
 3 Vision Care LLC filed the above action for declaratory relief and breach of contract against  
 4 defendant Liberty Mutual Fire Insurance Company (“Liberty”) (the “First LensCrafters Action”).  
 5 Plaintiffs later amended the complaint to add an additional defendant, Executive Risk Specialty  
 6 Insurance Company (“ERSIC”). *See* Declaration of Celia M. Jackson in Support of Administrative  
 7 Motion (“Jackson Dec.”), filed herewith, at Ex. 1. The complaint alleged that Liberty and ERSIC  
 8 had an obligation to defend and indemnify plaintiffs with respect to the *Snow* Action and sought  
 9 declaratory relief on both issues. *Id.*

10      Upon cross-motions for summary judgment, the Court issued an Order determining that  
 11 Liberty and ERSIC had a duty to defend plaintiffs against the *Snow* Action. *See* Jackson Dec., Ex.  
 12 2. In a later summary judgment ruling involving Liberty and ERSIC, the Court ruled that the  
 13 ERSIC policy is excess to the Liberty policy. *Id.* at Ex. 3. Judgments related to both sets of  
 14 motions were entered on November 22, 2005 and November 7, 2005, respectively. Liberty has  
 15 appealed the judgments to the Ninth Circuit; that appeal is currently pending. *Id.*, ¶ 5.

16      By stipulation of the parties, plaintiffs’ claims for indemnity alleged in the First  
 17 LensCrafters Action were dismissed without prejudice as not ripe for adjudication. Jackson Dec.,  
 18 Ex. 4. The June 21, 2005 Stipulation and Order dismissing the indemnity claims on that ground  
 19 provided that: (1) any party to the stipulation could file a new action to adjudicate the dismissed  
 20 indemnity claims, (2) such action must be filed in the Federal District Court for the Northern  
 21 District of California, and (3) the parties to the stipulation consent to exclusive jurisdiction and  
 22 venue of such an action in this Court. *Id.*

23       **III. THE SECOND ACTION**

24      On May 31, 2007, LensCrafters, Inc. and EYEXAM of California, Inc. filed a Complaint for  
 25 Declaratory Relief against Liberty, ERSIC and some additional insurers, which was assigned Case  
 26 No. C-07-2853 EMC (the “Second LensCrafters Action”). This action is the new action that was  
 27 provided for in the Court’s Order dismissing the indemnity claims; it is being filed now because  
 28 settlement negotiations in the underlying *Snow* litigation have progressed to the point that the issue

1 of which insurers must indemnify plaintiffs for a judgment or settlement of the *Snow Action* is now  
 2 ripe for consideration. Jackson Dec., ¶ 7. The additional insurers named as defendants — Untied  
 3 States Fire Insurance Company, Markel American Insurance Company and Westchester Fire  
 4 Insurance Company — are plaintiffs' excess insurers. *Id.*

5 **IV. THE ACTIONS ARE RELATED**

6 The First LensCrafters Action and the Second LensCrafters Action are related cases within  
 7 the meaning of Local Rule 3-12. As explained above, the Second LensCrafters Action is the new  
 8 action that was provided for in the Court's Order dismissing the indemnity claims from the first  
 9 action. In addition, both plaintiffs in the Second LensCrafters Action were also plaintiffs in the  
 10 First LensCrafters Action. Likewise, there is an overlap of defendants in the two cases, as both of  
 11 the insurance company defendants from the First LensCrafters Action are defendants in the latter  
 12 action (three additional insurance companies have been added to fully resolve the issues in one  
 13 proceeding). The two actions involve the same underlying putative class action suit against  
 14 plaintiffs, the same transactions and events that gave rise to the underlying suit, the same insurance  
 15 policies (there are some additional policies at issue in the instant action), and substantially the same  
 16 insurance policy interpretation and coverage issues, including issues that already are the subject of a  
 17 summary judgment orders in the First LensCrafters Action. Four of the five defendants in the  
 18 Second LensCrafters Action (including the two defendants in the First LensCrafters Action) have  
 19 no objection to deeming the actions related and having the latter-filed action heard by Judge  
 20 Armstrong. *See* Jackson Dec., ¶¶ 8, 9.

21 Moreover, coordination before the Judge that is already familiar with, and has issued  
 22 summary judgment orders relating to, the complex insurance coverage issues involved in both cases  
 23 would conserve resources of the Court, avoid duplication of effort, avoid conflicts that could arise  
 24 from having two different judges addressing the same or substantially the same factual and legal  
 25 issues, and promote the most efficient determination of the latter-filed action.

26 **V. CONCLUSION**

27 For the reasons stated above, the Court should find that the two actions are related and  
 28 assign the later-filed action (No. C-07 2853 EMC) to the Honorable Saundra Brown Armstrong.

1 DATED: June 8, 2007

Respectfully submitted,

2 HELLER EHRLMAN LLP

3  
4 By /s/ Celia M. Jackson  
5 Celia M. Jackson

6 Attorneys for Plaintiffs  
7 LENSCRAFTERS, INC., EYEXAM OF CALIFORNIA,  
INC., AND EYEMED VISION CARE, LLC

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